BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES R. TERRELL	)	
Claimant	)	
	)	
VS.	)	
	)	
FIRST RESPONSE, INC.	)	
Respondent	)	Docket No. **1,030,272**
	)	
AND	)	
	)	
ACE PROPERTY & CASUALTY INS. CO.	)	
Insurance Carrier	)	

ORDER

Both parties requested review of the September 4, 2008 Award by Administrative Law Judge Marcia Yates Roberts. The Board heard oral argument on December 3, 2008.

APPEARANCES

John G. O'Connor of Kansas City, Kansas, appeared for the claimant. Gary R. Terrill of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Charles R. Terrell was employed as a security guard for respondent. He suffered injury as a result of accidentally driving a golf cart off a seven foot high dock. Respondent argued the accident was not compensable because Terrell was engaged in prohibited work when the accident happened. Respondent further argued the accident was not compensable because Terrell failed to use a seat belt.

The Administrative Law Judge (ALJ) found the claim compensable. The ALJ concluded Terrell was neither engaged in prohibited work nor willfully failed to use a seatbelt at the time of the accident. The ALJ further determined Terrell was a part-time hourly employee at the time of the accident and still capable of sedentary employment. But the ALJ concluded Terrell had failed to meet his burden of proof to establish a work disability or the amount of his past medical expenses. Consequently, the ALJ awarded Terrell temporary total disability compensation and permanent partial disability compensation based upon a 40 percent whole body functional impairment. Both parties requested review of the ALJ's Award.

Terrell requests review of the following: (1) average weekly wage; (2) nature and extent of disability; and, (3) payment of past medical expenses. Terrell argues he was a full-time employee and therefore his average weekly wage should be calculated using 40 hours. Secondly, Terrell argues that he is not realistically employable and he should be found permanently and totally disabled. And thirdly, Terrell's medical expenses from treatment at KU Medical Center and Golden Heights Living Center due to his work-related injury should be ordered paid by respondent.

Respondent requests review of the ALJ's determination that Terrell's accidental injury was compensable. Respondent argues Terrell's injury occurred when he was engaged in prohibited work outside his authority because he was chasing intruders instead of simply reporting the incident to law enforcement authorities as he had been instructed. Respondent next argues Terrell willfully failed to use a reasonable and proper guard against the accident, i.e. a seat belt. In the alternative, if this claim is found to be compensable, the respondent requests the Board to affirm the ALJ's Award.

The issues for Board determination include whether Terrell suffered accidental injury arising out of and in the course of employment and, if so, his average weekly wage, nature and extent of disability and entitlement to payment of past medical expenses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Terrell was employed as a security guard for respondent. He had been assigned to work at various businesses over the course of his career with respondent. He had been assigned permanently with one business for a period of time but had taken a leave of absence from that permanent assignment for heart bypass surgery. When he returned to work he received temporary assignments to fill in for other guards off work because of illness or vacation.

On April 16, 2006, Terrell was assigned to work at a junkyard. His rate of pay was $9 an hour and he was scheduled to work 7 days. He testified that he was supposed to work 9 hours a day during the week and 12 hours a day on the weekend.

Terrell's job at the junkyard required that he work in a guard station watching 6 monitor screens. And he was required to make 5 or 10-minute rounds of the property at least twice on his shift. Terrell agreed that he was only authorized to leave the guard station to go to the restroom or to make his rounds.

Respondent had another security guard located in a guard station at a separate location on the junkyard property. Terrell testified that although he had a telephone at his guard station he was to take his golf cart and drive over to the other security guard's station to notify him if he saw intruders. And that the other security guard was to make the report. Terrell testified:

> Q. All right. Now, just briefly, and I do mean briefly, tell me how the accident happened.
>
> A. Okay. I was watching, my job was to watch the monitor.
>
> Q. Security monitor?
>
> A. Yeah. They had cameras everywhere down there because it was a large area and no one ever worked down there, no one. Everybody went home I mean, they had all this high priced copper and all they had was a camera and us. Well, on the weekend was their worst time so they had another guard that had shacked below me and I was to contact him if I seen anything on the monitor. And when I went in there, it was on Saturday or Sunday, I said, "You're going to be down there and I'm up here. We've got a phone here. What's your number?" He said he didn't know and that that was immaterial. I had a golf cart to go down and contact him if I seen anybody. I said, "Well, I have a cell phone. Give me your number and that would be a faster way of telling you." He had to be the one to report. I report to him - -.
>
> Q. What's his name, do you know?
>
> A. Bill, someone name[d] Bill. And he was to call the company, have the information to call the police. It was kind of a roundabout deal.[1]

Terrell further testified that during the week if he saw something suspicious on the monitors he was to call respondent to get permission to call the police. But on the weekend the process was different as the other security guard had instructed Terrell to

[1] R.H. Trans. at 30-31.

drive down to his guard shack and inform him so he could make the call to respondent or law enforcement authorities.

On April 16, 2006, at 3 a.m. as Terrell was watching a security monitor, he saw four individuals on the property. So he got in a golf cart and headed for the second guard shack intending to notify the other guard that four intruders were on the property. As he crossed the rough terrain he missed his turn to the other guard shack and decided to turn around on a ramp but instead he went airborne off the dock and landed hard enough that the wheels were broken off the golf cart. He did not have his seat belt fastened. After the accident, Terrell did not have any pain. He notified his supervisor right after he had driven off the dock. Later he realized that he had hit his head because his cap was missing after the accident. But Terrell had filled out a contemporaneous incident report which indicated that after he saw the four intruders, he got in the golf cart and ran after them.[2]

Terrell continued to work but at about the end of the second work day after the accident he started feeling weird. He drove himself to the Kansas University Hospital and collapsed at the information desk. Terrell was diagnosed with a subdural hematoma and surgery was performed. Terrell was hospitalized for two weeks and then transferred to the Golden Heights Living Center for rehabilitation because he could neither talk nor walk.

Before the accident, Terrell had been receiving Social Security retirement benefits since the age of 62. He further testified that he did not have any problems with his memory, speech, vision or balance before the accident. He currently has problems remembering and he completely loses his vision. Because of his concern about his intermittent vision loss he does not drive any more. He also has ringing in his ears. Finally, he has balance problems and frequently uses a cane to assist in walking.

William Pippin Jr., an operation supervisor for respondent on April 16, 2006, was Terrell's supervisor. As part of his job duties, Mr. Pippin was responsible for training Terrell. Mr. Pippin testified that the fundamental duty of a security guard is to observe and report. And respondent's security guards have no authority to arrest or detain anyone.

On April 16, 2006, Mr. Pippin had received a call that Terrell had an accident on the golf cart. Mr. Pippin went to the junkyard and met with Terrell. He asked Terrell what had happened and Terrell said he observed the intruders and got on the golf cart and chased them. Mr. Pippin testified that the golf cart had flipped over in the accident but it had been turned back over and driven back to the guard shack by the time he arrived. Mr. Pippin stated the proper procedure for Terrell should have been to report to law enforcement and

[2] R.H. Trans., Resp. Ex. A.

then respondent. But Mr. Pippin agreed that Terrell was not disciplined for his actions that night.

Mindy Mitzner, respondent's office manager, testified that a security guard's main duty is to observe and report. And respondent's security guard's have a Class B license which means they do not have the authority to detain, arrest or be armed. Ms. Mitzner further agreed that the limits of authority section of respondent's policies and procedure manual does not specifically prohibit or even mention giving chase. Ms. Mitzner further testified that she did not remember Terrell as being a full-time employee because there were weeks when he got less than 32 hours. But she agreed she would have to rely upon the schedules and time sheets to determine whether Terrell was a full-time employee.

The parties provided a wage stipulation that included the hours and dates Terrell worked in the 26-week period preceding the April 16, 2006 accident. As the ALJ noted in the Award, Terrell only worked 4 weeks of the 26 weeks preceding the date of accident. The stipulation reflected Terrell only worked 13 hours the week ending December 31, 2005, 36 hours the week ending January 7, 2006, 30 hours the week ending January 28, 2006, and 30 hours the week ending April 15, 2006.

Dr. P. Brent Koprivica examined and evaluated Terrell on June 18, 2007, at the request of claimant's attorney. Dr. Koprivica reviewed the medical records and performed a physical examination of Terrell. Dr. Koprivica concluded the subdural hematoma Terrell suffered was caused by the April 16, 2006 accident. As a result of the closed head injury Terrell suffers episodic migraines with visual loss, problems with expressive aphasia (the loss of the ability to find appropriate words to express thoughts), difficulty with balance and post-traumatic tinnitus. Dr. Koprivica rated Terrell with a 40 percent whole person functional impairment. Dr. Koprivica also imposed permanent restrictions that Terrell not drive, that he not be placed in any environment where his loss of balance would put him at risk, such as at heights or around dangerous equipment, and with his aphasia he could not perform work that required typing or speaking. Finally, Dr. Koprivica opined Terrell was realistically and practically unemployable. Dr. Koprivica testified:

> Q. Knowing what you do about Mr. Terrell, and also taking into account your experience in performing pre-employment physicals, do you believe that as a physician performing such a pre-employment physical you could in good faith certify Mr. Terrell as capable of any type of employment?
>
> A. Not in my opinion. I mean, he's not - - there would be too big of a safety issue in the workplace with the balance issues that he has. And realistically, with the memory problems that he has, he's not going to be hired, especially at his advanced age.

> Q. Do you have an opinion whether or not as a result of the injury of April 16, 2006, Mr. Terrell should be considered practically and realistically unemployable?
>
> MR. TERRILL: Object. Calls for a legal conclusion. You may answer.
>
> THE WITNESS: That would be my opinion as an occupational physician.[3]

At the request of respondent's attorney, Dr. Michael E. Ryan, a board certified neurologist, conducted an evaluation of Terrell on September 27, 2007. Dr. Ryan reviewed Terrell's medical records and performed a physical examination of Terrell. Dr. Ryan concluded that Terrell's closed head injury was related to the accidental injury on April 16, 2006. Dr. Ryan testified that Terrell made a remarkable recovery but developed intermittent post-traumatic migraine events with visual disruption and mild short-term memory loss. Although Terrell has balance and gait problems, Dr. Ryan attributed those conditions to peripheral neuropathy unrelated to the accidental injury. Dr. Ryan concluded Terrell could perform some sedentary work such as desk work or reception work.

Initially, respondent argues that this claim is not compensable because Terrell was injured while performing prohibited work.

In 2 *Larson's Workers' Compensation Law*, Chapter 33, it is stated:

> When misconduct involves a prohibited overstepping of the boundaries defining the *ultimate work* to be done by the claimant, the prohibited act is outside the course of employment. But when misconduct involves a violation of regulations or prohibitions relating to the *method* of accomplishing that ultimate work, the act remains within the course of employment.

Kansas law recognizes the distinction and has adopted the general rule that if an employee is performing work which has been forbidden, as distinguished from doing his work in a forbidden manner, he is not acting in the course of his employment.[4] Conversely, it is equally recognized that if work is performed in a forbidden manner an employee is still acting in the course of his employment.[5]

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[3] Koprivica Depo. at 23-24.

[4] *Hoover v. Ehrsam Company,* 218 Kan. 662, Syl. ¶2, 544 P.2d 1366 (1976).

[5] *Servantez v. Shelton*, 32 Kan. App. 2d 305, 81 P.3d 1263 (2004).

The distinction between performing work which has been forbidden and doing work in a forbidden manner is demonstrated in 2 *Larson's Workers' Compensation Law*, § 33.02[5] in the following manner:

> If the claimant's job is to remove stones, but the claimant is forbidden to use a tractor, removing stones with a tractor is still removing stones and an injury from the tipping of the tractor is compensable.

Here, it is argued that Terrell was only to observe and report but his act in getting in the golf cart to chase away the intruders was prohibited. Although Terrell testified that he was using the golf cart only to go to a separate guard station to report that he had seen intruders, the contemporaneous reports and comments he made indicate he was attempting to chase the intruders off the premises. Nonetheless, there is simply no specific prohibition in the respondent's policy and procedure manual that forbids the action taken by Terrell. His job was to observe and report and arguably that is what occurred as he was driving the golf cart. At a minimum, Terrell was performing an assigned task in a forbidden manner. The Board concludes claimant's accident arose out of and in the course of his employment with respondent.

Respondent next argues that the claim should be denied because Terrell was not wearing a seat belt when the accident occurred. This is based upon Terrell's testimony that when the accident occurred he was not wearing a seat belt.

The ALJ determined that there was no evidence Terrell willfully failed to use a reasonable and proper guard or protection provided by respondent.

K.S.A. 2006 Supp. 44-501(d)(1) provides:

> If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

The burden placed upon an employer by the Kansas Supreme Court with respect to this defense is substantial. As used in this context, the Kansas Supreme Court in *Bersch*[6] and the Court of Appeals in a much more recent decision in *Carter*[7] have defined "willful" to necessarily include:

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[6] *Bersch v. Morris & Co.*, 106 Kan. 800, 189 Pac. 934 (1920).

[7] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

> . . . the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . 'Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse.' *Carter* at 85.

The mere voluntary and intentional omission of a worker to use a guard or protection is not necessarily to be regarded as willful.[8]

In this instance, there is simply the admission by Terrell that he was not wearing a seat belt when the accident occurred. Terrell's actions may well have been careless and negligent but the evidence does not rise to the level that his actions were intentional and deliberate.

Moreover, the foregoing statute is supplemented by K.A.R. 51-20-1 which provides:

> **Failure of employee to use safety guards provided by employer.** The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

The administrative regulation promulgated to implement the requirements of K.S.A. 44-501(d) mandates that when safety rules are generally disregarded by employees and not rigidly enforced by the employer, then violation of the rules will not prejudice an injured employee's right to compensation. There was no testimony about respondent's policy, if any, regarding seat belt usage. Likewise, there was no testimony that respondent required the seat belt be worn or that there were repercussions for failure to use a seat belt while operating the equipment.

The Board concludes that, under the facts of this case and based upon the evidence compiled to date, the failure to use a seat belt cannot be utilized as a defense to the claim.

Terrell argues that his undisputed $9 an hour wage should have been multiplied by 40 hours as he was a full-time employee. Terrell did testify that although the assignment to the junkyard job was a temporary assignment, nonetheless, he was expected to work at least 40 hours a week at that job. Terrell further described his job as a "juggled up" full-time position but agreed it could be called a "juggled up" part-time job as he was there to work whenever respondent asked him.

As previously noted, the parties wage stipulation reflected Terrell only worked 13 hours the week ending December 31, 2005, 36 hours the week ending January 7, 2006, 30 hours the week ending January 28, 2006, and 30 hours the week ending April 15, 2006.

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[8] *Thorn v. Zinc, Co.*, 106 Kan. 73, 186 Pac. 972 (1920).

This evidence establishes that Terrell was a part-time hourly employee who filled in when other security guard's were unavailable due to sickness or vacation.

K.S.A. 44-511(b)(4)(A) provides that the average gross weekly wage for a part-time hourly employee shall be determined in the manner provided in K.S.A. 44-511(b)(5) which requires the claimant's gross earnings over the weeks before the accident to be divided by the weeks actually worked up to a maximum of 26 weeks. In this instance, the calculation results in an average gross weekly wage of $245.25. Consequently, the ALJ's Award is affirmed to reflect Terrell was a part-time employee with an average gross weekly wage of $245.25.

Terrell next argues that he is permanently and totally disabled. Although both doctors agreed Terrell's subdural hematoma was caused by his work-related accident, they differed on the permanent impairment he suffered from that injury. Dr. Ryan limited the effects of the accident to ongoing intermittent post-traumatic migraine events with visual disruption and mild short-term memory loss. Dr. Ryan concluded Terrell could perform some sedentary work. Dr. Koprivica opined that as a result of the accident Terrell suffers episodic migraines with visual loss, problems with expressive aphasia, difficulty with balance and post-traumatic tinnitus. Dr. Koprivica restricted Terrell from driving, working where his loss of balance would put him at risk and noted Terell could not perform work that required typing or speaking. Ultimately, Dr. Koprivica opined Terrell was realistically and practically unemployable.

It is noteworthy that none of the conditions Terrell now complains of pre-existed the April 16, 2006 accidental injury. This is especially significant because Dr. Ryan does not attribute Terrell's balance problems to the injury even though those problems did not occur until after the accident. At the regular hearing Terrell continued to have difficulties with his short-term memory as well the ability to find the right words to express himself. At the regular hearing the following colloquy occurred:

> Q. What year did you leave CO-OP?
>
> A. Let's see, I worked there for eight or 10 years, then I went to Ottawa - - oh, what's that building, the official building in Ottawa? I was a janitor there for eight years.
>
> Q. In a public building like a courthouse?
>
> JUDGE FOERSCHLER: City Hall or Courthouse?
>
> A. City Hall, yes, sir.

> Q. (By Mr. O'Connor) You seem to have some difficulty with word finding; is that correct?
>
> A. Yes. If it wouldn't be for my automatic speller I'd be in real trouble, but I use that speller and get approximately the spelling and it corrects it and then it tells the definition.
>
> Q. Did you have this trouble with memory and word finding before you had the accident with the golf cart?
>
> A. Oh, no, huh-uh. No, I didn't have any trouble.[9]

Dr. Ryan agreed that Terrell was not exaggerating his memory problems and that his intermittent visual loss was problematic.

Permanent total disability exists when an employee, on account of his or her work-related injury, has been rendered completely and permanently incapable of engaging in any type of substantial, gainful employment.[10]

An injured worker is permanently and totally disabled when rendered "essentially and realistically unemployable."[11] The injuries claimant suffered do not raise a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2); therefore, it is the responsibility of the trier of fact to determine the existence, extent and duration of an injured worker's incapacity.[12]

"The existence, extent and duration of an injured workman's incapacity is a question of fact for the trial court to determine."[13] It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trial court must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.[14]

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[9] R.H. Trans. at 13.

[10] K.S.A. 44-510c(a)(2).

[11] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[12] *Id*. at 112.

[13] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 803, 522 P.2d 395 (1974).

[14] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 785, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

In *Wardlow*[15], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

The Board finds Dr. Koprivica's opinion more persuasive that the balance and other problems resulted from the accident. Consequently, due to the residuals from his work-related accident, Terrell is permanently and totally disabled.

Finally, the Workers Compensation Act compels a respondent to provide medical treatment that is reasonably intended to cure and relieve an injured employee of the effects of a compensable injury.[16] It was undisputed that the medical treatment Terrell received at KU Medical Center and Golden Heights Living Center was reasonably intended to cure and relieve Terrell from the effects of his work-related injury. Consequently, respondent is liable for the costs of such treatment, subject to the medical fee schedule.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Marcia Yates Roberts dated September 4, 2008, is modified to reflect Terrell is entitled to compensation for a permanent total disability and payment for medical treatment received at KU Medical Center and Golden Heights Living Center.

The claimant is entitled to 9.29 weeks temporary total disability compensation at the rate of $163.51 per week or $1,519.01 followed by permanent total disability compensation at the rate of $163.51 per week not to exceed $125,000 for a permanent total general body disability.

As of May 20, 2009, there would be due and owing to the claimant 9.29 weeks of temporary total disability compensation at the rate of $163.51 per week in the sum of $1,519.01 plus 152.14 weeks of permanent total disability compensation at the rate of $163.51 per week in the sum of $24,876.41 for a total due and owing of $26,395.42, which

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[15] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[16] K.S.A. 44-510 (Furse 1993).

is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $98,604.58 shall be paid at $163.51 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of May 2009.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant
Gary R. Terrill, Attorney for Respondent and its Insurance Carrier
Marcia Yates Roberts, Administrative Law Judge